OUTER HOUSE, COURT OF SESSION

[2020] CSOH 18

P518/16

OPINION OF LORD MULHOLLAND

In the petitioner

MARY ITOHAN ENABUREKHAN (AP)

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winters; Drummond Miller LLP
Respondent: Pirrie; Office of the Advocate General

12 February 2020

Introduction

[1] This is a judicial review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 3 March 2016 refusing permission to appeal to itself.

Immigration history

[2] The petitioner is a Nigerian national. She was born on 3 June 1983. Her immigration history as set out in the petition is that she came to the UK on 10 October 2007 on a student visa. This visa was valid until 31 October 2009. The visa was granted for the petitioner to study at Aberdeen University. She applied for further leave to remain as a student on

29 October 2009. This was refused on 17 November 2009 as her application form was incomplete. A further application was lodged on 14 December 2009. This application was refused on 25 February 2010 with no right of appeal. On 22 October 2010 an application for leave to remain as a tier one highly skilled migrant post study was submitted. This was refused on 10 December 2010 with no right of appeal. On 1 March 2012 the petitioner lodged an application for an European Economic Area (EEA) residence card. On 26 March 2012 her application was rejected as no details of her EEA sponsor were provided. A further application for an EEA resident's card was lodged on 26 April 2012. This was refused on 2 October 2012 with no right of appeal. The petitioner was then encountered by immigration officers on 25 February 2013. She was issued with an IS115A notice of removal. On 26 February 2013 she was served with removal directions to Nigeria. On 28 February 2013 she submitted further representations for an EEA residence card. This was refused on 7 March 2013 with a right of appeal. She was granted temporary admission on 18 March 2013. She required to report weekly. On 22 May 2013 she lodged a human rights application for leave to remain under article 8 of the European Convention of Human Rights. This was refused without a right of appeal on 14 June 2013. She was detained on 16 December 2013. On 19 December 2013 she lodged a statement of additional grounds. Bail was granted on 20 December 2013. On 25 June 2014 a decision was made to refuse and certify the petitioner's human rights claim as clearly unfounded in terms of section 94(2) of the Nationality, Immigration and Asylum Act 2002. On 24 March 2014 she raised a judicial review challenging the decision to certify the human rights claim as clearly unfounded. On 9 October 2014 the judicial review was concluded and the certification was withdrawn so that reconsideration could be given to the petitioner's case. On 23 October 2014 the respondent refused the petitioner's human rights claim as she did not meet the eligibility

criteria in relation to her claimed family life in the UK, that she had not established a family life in terms of article 8 and did not qualify under the immigration rules. It was found that there were no significant obstacles preventing her re-integration into Nigerian society and as a result paragraph 276ADE(VI) of the rules were not satisfied. The respondent found that it would not be unreasonable to expect her to return to Nigeria and that the existence of her private life in the UK was not sufficiently compelling to be classed as an exception to the normal practice of removal. With regard to exceptional circumstances, the respondent accepted that the petitioner had extended family ties in the UK but found that this did not meet the definition of family life under the Immigration Rules for the purposes of article 8. The petitioner's relationship with her brother and mother and other extended family members were considered but it was found that she had nothing more than normal emotional ties. The dependency threshold had not been met. She was, however, allowed an in-country appeal to the First-tier Tribunal and the petitioner appealed to the First-tier Tribunal against the respondent's decision of 23 October 2014 refusing her application for leave to remain in the UK. On 22 September 2015 the First-tier Tribunal refused the petitioner's appeal. The judgement is 6/5 of the inventory of productions.

The decision of the First-tier Tribunal

[3] As stated above, the First-tier Tribunal refused the petitioner's appeal. In the judgement the Tribunal found that there were no more than normal emotional ties between the petitioner and her brother's family (see paragraphs 61 and 65). The Tribunal noted that the petitioner helped to care for her nephews. If she returned to Nigeria her nephews' parents would still look after them. She did not have a particularly close relationship with her mother which was described as a relationship between a mother and adult child. Her

mother's status in the UK was not settled and she may have to return to Nigeria (paragraph 61). At paragraph 63 the Tribunal noted that the petitioner stated that she had a partner but that relationship started only a few months ago when her immigration status was precarious. According to the partner, whose life in the UK was also described as precarious, he intended making the petitioner his wife although there was no evidence of this apart from the evidence of the petitioner's partner. He was reticent about what he would do if the petitioner returned to Nigeria. It was clear to the Tribunal judge that he would not go with her and seemed unprepared to return with her to marry her to enable her to make a spousal application to return to the UK. The Tribunal judge concluded that little weight could be given to this relationship (paragraph 70). The Tribunal refused her claim within the rules (paragraph 62). The Tribunal then considered her claim outside the rules. The Tribunal judge considered that there was no good arguable case for consideration outside the immigration rules (paragraph 69). He concluded that the petitioner had been abusing the immigration system in the UK since 2009. Her life with her brother had been established while she had no legal right to be here. Although the petitioner stayed with her brother and he financed her, if she was granted leave to remain in the UK she could well move out of her brother's house. The petitioner originally stated that she wanted to make use of her engineering degree but now stated that if she remained she may set up a childminding business with a friend. The petitioner came to the UK using deception and did not intend to return to Nigeria (paragraph 70).

Appeal against the decision of the First-tier Tribunal

Permission to appeal made to the First-tier Tribunal

[4] The petitioner made an application to the First-tier Tribunal to grant permission to appeal to the Upper Tribunal. The first ground averred that the First-tier Tribunal judge erred in finding that the petitioner used deception to enter the UK as a student. The second ground challenged the judge's finding that the petitioner was responsible for the content of an earlier application which stated that she had family in Nigeria, contradicting her submission in the appeal to the First-tier Tribunal judge. The third ground challenged the judge's conclusions on article 8, that the best interests of the petitioner's nephews did not require her presence in the UK. The First-tier Tribunal refused permission to appeal on 9 February 2016 (6/7 of the inventory of productions). Permission was refused on the basis that the First-tier Tribunal judge was entitled to conclude that the petitioner on arrival had no intention of leaving the UK and thus seeking admission on a temporary basis must necessarily have involved deception. With regard to the second ground, this was a conclusion properly open to the judge who was not required to accept every explanation offered by the petitioner. With regard to the third ground, this was a conclusion open to the judge, particularly as the children lived with their parents. The grounds were in reality no more than a disagreement with the experienced judge's detailed and thorough assessment of the evidence against the applicable law.

Permission to appeal made to the Upper Tribunal

[5] The petitioner thereafter sought permission to appeal directly from the Upper Tribunal. The grounds of appeal (6/8 of the inventory of productions) were that the First-tier Tribunal erred in holding that something more than the establishment of normal emotional

ties was required to be demonstrated for a successful article 8 claim. It was averred that the Tribunal in reaching its decision made an error of fact in not appreciating that the petitioner lived with her brother, his wife and their children (ground 1). Ground 2 averred that the Tribunal erred in law in assessing section 117B(6) of the Nationality, Immigration and Asylum Act 2002 by failing to determine whether the petitioner was in a *de facto* parental relationship with her nephews and whether it was reasonable for them to leave the UK. The third ground averred that the First-tier Tribunal erred in law when finding that there was not a good arguable case thereby imposing another separate hurdle to be overcome by the petitioner. The fourth ground averred that the First-tier Tribunal erred in law in speculating that if granted leave to remain the petitioner could well move out of her brother's house and claim benefits, there being no evidence to support such a finding. The Tribunal failed to take account of relevant factors when assessing the article 8 claim, the relevant factors being that she spoke English, was not a burden on the taxpayer, had no other family life in Nigeria and family life could not be continued by electronic communication or occasional visits.

[6] On 3 March 2016 the Upper Tribunal refused permission to appeal (6/9 of the inventory of productions). It is this decision which is the subject of this review. Permission to appeal was refused for the following reasons (for appellant read petitioner):

> "The appellant, who is a citizen of Nigeria, arrived in the UK in October 2007 and was admitted as a student with leave to remain until 31 October 2009. She has made unsuccessful applications for further leave as a student and for post study work and twice in 2012 applied unsuccessfully for a residence card as the family member of an EEA national present in the UK exercising Treaty rights. Despite that, she simply continued to remain in the UK without leave and on 14 June 2013 a human rights claim was refused. Having been detained on 16 December 2013 for the purpose of removal she made further submissions and sought permission to bring a judicial review of the certification of her human rights claim as being clearly unfounded. Those proceedings were settled on terms that generated the refusal of her human rights claim that she challenges in these proceedings.

> The application was refused by the respondent because it was not accepted that the appellant met the requirements of the rules in respect of her family and private life and because the respondent saw no reason why leave should be granted outside the rules to secure an outcome compliant with article 8 of the ECHR.
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> The judge dismissed the appeal, finding as a fact that the appellant had no intention of leaving the UK on completion of her studies and that the relationships she had built with family members and a partner in the UK did not amount to protected family life for the purposes of article 8. The judge explained why the best interests of children in the extended family did not require that the appellant remain. In striking a balance between the competing interests in play, the judge explained why removal of the appellant would not bring about a disproportionate interference with any rights protected by article 8.
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> The grounds express disagreement with those clear and carefully reasoned findings but come nowhere even close to identifying any arguable error of law. The asserted existence of a *de facto* parental relationship is little short of fanciful. The judge did not impose an inappropriate threshold test, as alleged by the grounds. She simply recognised that the consideration of the claim under the rules constituted a comprehensive assessment of the claim so that little more needed to be said when examining whether a sound claim had been made for a grant of leave outside the rules. The judge was not engaging in impermissible speculation when considering the possibility of a future recourse to public funds and the factors that the grounds assert were left out of account were not such as to demand specific or separate analysis as they were not capable, in themselves or cumulatively, of being material to the outcome."

Grounds of review

[7] At the continued hearing the petitioner's counsel confirmed that he was not insisting on the first ground of review (paragraph 10i of the petition as detailed in paragraphs 20-23 of the revised note of argument). Three grounds of review remained. These were that the First-tier Tribunal erred in law in holding that the petitioner's asserted *de facto* parental relationship with her nephews was little short of fanciful, the First-tier Tribunal had not given any, or failed to give adequate reasons for coming to this finding and the First-tier Tribunal failed to make any findings in relation to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (ground of review 10(ii) of the petition); that the Upper Tribunal misdirected itself in holding that the First-tier Tribunal did not apply an

inappropriate threshold test of a good arguable case for considering article 8 of the European Convention of Human Rights outside the immigration rules (ground of review 10(iii) of the petition); and that the Upper Tribunal erred when finding that the First-tier Tribunal did not engage in impermissible speculation, there being no or insufficient evidence to support the First-tier Tribunal's findings and further erred in law in finding that the First-tier Tribunal did not speculate on the petitioner's employment prospects and where she would live (ground of review 10(iv) of the petition).

Preliminary Matters

[8] Two preliminary matters were raised at the first hearing of the petition (the hearing was continued to await the outcome of the UK Supreme Court decision in *MA (Pakistan)* v *Secretary of State for the Home Department* on how section 117B(6) should be interpreted). The first concerned whether the EBA criteria (second appeals test) was still under review and a live issue at the substantive hearing. I noted at the continued hearing that this was no longer a live issue standing the decision in *SA* v *Secretary of State for the Home Department* 2019 SC 451 which held that the decision on whether the second appeals test had been met was to be taken as a preliminary matter at the stage of determining whether permission should be granted and could not be re-raised at a later stage (paragraphs 26–28 of the opinion of the court delivered by Lord President (Carloway)).

[9] The second preliminary point concerned adjustments intimated on 18 August 2016 to statements 10(i) and (iv) of the petition. The respondent submitted that permission to proceed had not been granted for these grounds and as a result unless permission was granted they could not be argued as they were out of time in terms of section 27B(1) of the Court of Session Act 1988. I allowed the amendments on the basis that the adjustments were

responses to the respondent's answers and did not, when the petition and answers were considered as a whole, introduce two new grounds of review. In any event if the adjustments introduced new grounds of review, I would have allowed them on the interests of justice as they were introduced in the early course of proceedings and prior to parties lodging notes of argument. I could identify no real prejudice to the respondent and I noted that in any event they were answered in the respondent's note of argument.

Submissions for the petitioner

[10] The First-tier Tribunal failed to have regard to section 117(B)(6) of the Nationality, Immigration and Asylum Act 2002 when deciding the article 8 claim. Although the petitioner's legal representative did not make specific submissions on section 117(B)(6) of the Nationality, Immigration and Asylum Act 2002 the issue was "Robinson obvious". The First-tier Tribunal had sufficient material before it to deal with the point and the contents of the material before it and findings in fact made in respect thereof would place it on notice that it was an obvious issue. The First-tier Tribunal is under a duty to make an assessment of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The point was explicitly before the Upper Tribunal who erred in law in concluding that the asserted existence of a *de facto* parental relationship was little short of fanciful. On the material before the First-tier Tribunal this point was arguable and the Upper Tribunal was in error in concluding that it was not. Had the First-tier Tribunal had regard to this provision, it would have been bound to hold that the petitioner had a genuine and subsisting parental relationship with her nephews and as a result the Upper Tribunal should have granted permission to appeal on this point. In determining this issue, it is not necessary in law for an individual to have parental responsibility for there to exist a parental relationship. Whether

there is a parental relationship depends on the individual's circumstances and whether the individual has stepped into the shoes of a parent. It is possible for more than two individuals to have a parental relationship with a child. The evidence (including the material presented to the First-tier Tribunal and the relevant findings in facts) demonstrated that the petitioner had a parental relationship. The reasons given for refusing to grant permission on this point were inadequate. With regard to grounds of review iii and iv, these grounds if established support the principal ground of review ii. With regard to ground of review iii, the Upper Tribunal erred in law when finding that the First-tier Tribunal did not impose an inappropriate threshold test but simply recognised that the consideration of the claim under the immigration rules constituted a comprehensive assessment of the claim so that little more needed to be said when examining whether a sound claim had been made for a grant of leave outside the immigration rules. With regard to ground of review iv, the Upper Tribunal erred in law by misdirecting itself when finding that the First-tier Tribunal did not engage in impermissible speculation. There was no, or insufficient, evidence to support the First-tier Tribunal's findings that if the petitioner was granted leave to remain in the UK she could well move out of her brother's house and claim benefits. In assessing proportionality, the First-tier Tribunal failed to take account of matters which were material to this assessment, namely that the petitioner speaks English, she is not a burden on the taxpayer, has no other family remaining in Nigeria and family life could not be continued through electronic means or occasional visits.

Submissions for the respondent

[11] With regard to ground of review ii, the First-tier Tribunal had no requirement to consider the petitioner's article 8 claim in terms of section 117(B)(6) of the Nationality,

Immigration and Asylum Act 2002 as it was not pled before it and this point would not have been "Robinson obvious". Had the Tribunal considered the claim in terms of this provision it would have been bound to reach the same decision. Given the findings in facts made by the First-tier Tribunal and the material before it submitted by the petitioner which bears on this issue, any error in law was immaterial. The reasons given by the Upper Tribunal on this point were adequate to an informed reader who would not be left in any real and substantial doubt about the reasons for the decision of the Upper Tribunal. With regard to ground of review iii, the Upper Tribunal did not err in law in holding that the First-tier Tribunal did not direct itself that a good arguable case was a hurdle to overcome before it would consider a case outside the immigration rules. In any event, had the First-tier Tribunal directed itself in that way, given its findings that there was no good arguable case, it would not have made findings in the petitioner's favour on proportionality outside the immigration rules. Any error of law would have been immaterial on the findings in fact and the material before it. With regard to ground of review iv, the Upper Tribunal did not err in law. The parties made submissions to the First-tier Tribunal about the likelihood of the petitioner being financially independent if she was given leave to remain in the UK (detailed at paragraphs 44 and 52 of its decision). The First-tier Tribunal did not find that the petitioner would move out of her brother's house and claim benefits, only that there was that possibility. That finding was within the range of reasonable findings open to the First-tier Tribunal on the evidence before it.

Decision

[12] It was agreed by parties that if ground of review ii (the petitioner's article 8 claim in terms of section 117(B)(6) of the Nationality, Immigration and Asylum Act 2002) was well

founded then that would be sufficient for the Upper Tribunal's decision to be reduced. This concession was well made (*per* the terms of section 117B(6) confirming that where the section is met the public interest does not require the person's removal). The review does not seek to determine whether there was a *de facto* parental relationship, this is a matter for the Tribunal (*HH* v *Secretary of State for the Home Department* 2015 SC 613 per Lord Brodie delivering the opinion of the court at paragraphs 14 and 15 summarising the respective jurisdictions of the Upper Tribunal and this court in judicial review). The review seeks to determine whether the Upper Tribunal erred in law in determining that it was not arguable that there was a *de facto* parental relationship in the material before and findings of fact made by the First-tier Tribunal. The Upper Tribunal concluded that the asserted existence of a *de facto* parental relationship was little short of fanciful. As was made clear in the Upper Tribunal Immigration and Asylum Chamber guidance note 2011 No 1: Permission to appeal to UTIAC (amended September 2013 and July 2014) in dealing with applications for permission to appeal, judges are concerned only with whether there is an arguable error of law, not whether the error is made out (paragraphs 12 and 37). The *de facto* parental relationship was not raised by the petitioner's legal representatives before the First-tier Tribunal. It is submitted that the point was "Robinson obvious" with a strong prospect of success in an appeal (*R* v *Secretary of State for the Home Department*, *ex parte* Robinson [1997] 3 WLR 1162 at page 945H *et seq*) and as a result could be considered by the Upper Tribunal when considering whether to grant leave to appeal. It is unfortunate that the point was not taken before the First-tier Tribunal and it could be said that if the point was "Robinson obvious" then it would have been obvious to the petitioner's legal representatives at the First-tier Tribunal. That said, the petitioner should not be penalised by the failure of the petitioner's legal representatives to take the point and allowing the point to be taken later

avoids the risk of a breach of convention rights. However, a point can only be taken where there is sufficient material to allow the determination of the point (*Advocate General for Scotland* v *Murray Group Holdings Ltd* 2016 SC 201 per Lord Drummond Young delivering the opinion of the court at paragraph 39). The First-tier Tribunal cannot re-hear the case on this point and it should not be lost that this is an appeal against the decision of the First-tier Tribunal. So, is there sufficient material to determine the point if leave to appeal is granted? The Upper Tribunal could have regard to the following material:

i. The petitioner's evidence per the adoption of her statement (6/2 of the inventory of productions) as her evidence in chief (paragraph 8 of the judgement of the First-tier Tribunal - 6/5 of the inventory of productions).

ii. The petitioner's evidence in cross examination (paragraph 9 *et seq* of the judgement of the First-tier Tribunal).

iii. Witness statement for the petitioner's brother Aaron Enaburekhan (6/3 of the inventory of productions) as his evidence in chief (paragraph 8 of the judgement of the First-tier Tribunal).

iv. The witness Aaron Enaburekhan's evidence in cross examination (paragraph 19 *et seq* of the judgement of the First-tier Tribunal).

v. Witness statement for the petitioner's sister in law Kerry Ann Enaburekhan (6/4 of the inventory of productions) as her evidence in chief (paragraph 25 of the judgement of the First-tier Tribunal).

vi. The witness Kerry Ann Enaburekhan's evidence in cross examination (paragraph 26 *et seq* of the judgement of the First-tier Tribunal).

vii. Witness statement for the oldest child (SOE)(6/4 of the inventory of productions - from page 20 and 6/10).

Of particular significance from this material to the issue of the existence of a *de facto* parental relationship are the following:

a. The petitioner looked after her brother's two children whilst he and his wife were working (paragraph 20 of her statement).

b. During the day she looked after the youngest child as he was not yet at nursery and she picked the oldest child up from school and during the school holidays looked after him on a full-time basis (*ibid)*.

c. She is the youngest child's godmother and is registered as the oldest child's next of kin (paragraph 22 of her statement).

d. She is a constant fixture in the children's lives (*ibid*).

e. If she was removed from the children's lives it would have a devastating impact on them, particularly the older child as she had been a constant in his life in terms of his care since he was 2 years old. She could probably say that the older child has spent more time with her than he had with his parents. (*ibid*).

f. It was not in the best interests of the children for the petitioner to be removed as their lives and care arrangements would be disrupted and they would be deprived of their relationship with their aunt with whom they have lived with for most of their lives (paragraph 25 of her statement).

g. Speaking to the children via skype would not compare to the personal contact that she has with them (*ibid*).

h. The petitioner has a close bond with the children. She has been in the youngest child's life since birth and the oldest child's life from the age of 2 years. She has looked after them and provided them with care and for her

to be removed would affect their emotional well-being and development (paragraph 7 of the statement of Aaron Enaburekhan).

i. The petitioner is the family's next of kin for emergency situations and is included in all of the family activities. The family would be de-stabilised if the petitioner was removed (paragraph 8 of the statement of Aaron Enaburekhan).

j. The petitioner is more than just an aunt to the children. She is an integral part of the family unit (paragraph 9 of the statement of Aaron Enaburekhan).

k. The petitioner provided full time child care and a loving, caring and nurturing environment for her nephews (paragraph 4 of the statement of Kerry Ann Enaburekhan).

l. The petitioner is nominated as the first point of contact in the case of emergencies with the oldest child's school (paragraph 6 of the statement of Kerry Ann Enaburekhan).

m. The petitioner's removal would devastate the two children. She is their daily carer and provides them with a lot of love and nurture (paragraph 9 of the statement of Kerry Ann Enaburekhan).

n. The petitioner is one of the best friends of the oldest child (SOE) and loves him and he loves her very much. He detailed how she looked after him and the effect her removal would have on him (witness statement for the oldest child (SOE)).

[13] Looking at this material it seems to me that there is sufficient material for the Upper Tribunal to determine the issue in an appeal. There are witness statements, most of which were incorporated into the evidence as evidence in chief, together with an assessment of the

evidence and Tribunal findings which could also bear on the issue. Other than a finding that the petitioner used deception to come to the UK, there appears to be no adverse credibility findings on the material which could bear on the *de facto* parental relationship issue. With regard to whether the issue was "Robinson obvious", I note that the First-tier Tribunal is under a duty to make an assessment of section 117B(6) (*Rhuppiah* v *The Secretary of State for the Home Department* [2016] 1 WLR 4203 per Sales LJ at paragraphs 50 and 51 and *AB (Jamaica)* v *Secretary of State for the Home Department* [2019] 1 WLR 4541 per Lord Justice Singh at paragraphs 44 and 54). Having listed the relevant material, it is clear to me that there is an abundance of material bearing on the issue which would place the First-tier Tribunal on notice that it required to deal with it. The fact that it was not explicitly pled is unfortunate and I can well understand in a busy court how it could be missed in the absence of specific submissions on it. That said, it seems to me to use the phraseology in *R* v *Secretary of State for the Home Department*, *ex parte* Robinson *supra*, that the issue was "readily discernible" from the material before it and as it is an obvious point of convention law which may favour the petitioner, the petitioner should not be prevented or prejudiced from raising it despite it not being pled before the First-tier Tribunal. I note that the Upper Tribunal in their reasons in refusing leave to appeal did not raise the "Robinson obvious" point which seems to me to be an implicit acceptance by the Upper Tribunal that it was a "Robinson obvious" point. There is also force in the petitioner's submission that the respondent's answers seek to introduce an issue which was not contained in the Upper Tribunal's decision (*Absalom* v *Governor of Kilmarnock Prison* [2010] CSOH 109 per Lord Tyre at paragraph 14). I should add, for the sake of completeness, that I consider that paragraph 56 of the judgement of Sales LJ in *Rhuppiah supra,* which was cited by the respondent's counsel, is not helpful in determining this issue. Paragraph 56 is dealing with

a different question of interpretation of section 117B(5), namely the weight to be given to a private life established when a person's immigration status was precarious and *R* v *Secretary of State for the Home Department*, *ex parte* Robinson *supra*, was not considered. For these reasons I conclude that the petitioner is not prevented from taking the point in an appeal, it not having been raised before the First-tier Tribunal.

[14] With regard to whether or not there is a good arguable case that the petitioner had a genuine and subsisting parental relationship with her nephews, I note that section 117(B)(6) of the Nationality, Immigration and Asylum Act 2002 provides that in relation to an article 8 claim, the public interest will not require a person's removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. The petitioner's nephews are qualifying children (British citizens under the age of 18 years) and it would not be reasonable to expect them to leave the UK given that their whole lives have been in the UK with their parents. What is meant by a genuine and subsisting parental relationship? In the case of *R (on the application of RK)* v *The Secretary of State for the Home Department* [2016] UKUT 00031 (IAC) (not decided until after the decision of the First-tier Tribunal at first instance) the Upper Tribunal considered this issue against a background of the applicant's daughter in law suffering from serious and progressive medical conditions. She was unable to look after her four children and the applicant applied for leave to remain outside the rules on the basis *inter alia* that as carer for the children she had a genuine and subsisting parental relationship with her grandchildren. The Upper Tribunal rejected this ground. The relevant passages in the judgement dealing with this issue are as follows:

> "[40] … a 'parental relationship' may in certain circumstances exist between someone who could not, in any legal sense, be seen as a parent ...

> [41] ... It is recognised … that more than 2 persons may be in a 'parental relationship' with a child ...
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> [42] Whether a person is in a 'parental relationship' with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have 'parental responsibility' in law for there to exist a 'parental relationship,' although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child.
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> [43] I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not *per se* 'parents.' A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship'.
>
> [44] If a non-biological parent ('third party') caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biological parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has 'stepped into the shoes' of a parent."

The case of *SR (subsisting parental relationship)* [2018] UKUT 00334 (IAC) was also cited to me as an example of a case where limited parental care (father's three-hour contact in fortnightly sessions) with no involvement in making important decisions in the child's life could still amount to a genuine and subsisting parental relationship for the purpose of section 117B(6). In the present case it was submitted that the petitioner played a much

stronger and extensive role in the children's lives than *SR* played in the life of his daughter, yet the Upper Tribunal in *SR* upheld his case in terms of section 117B(6).

[15] The petitioner's counsel also cited the case of *MSA* v *The Advocate General for Scotland* 2018 SLT 1313 in submissions. This case was decided after the Upper Tribunal had refused leave to appeal. In this case, the court reviewed a decision of the Secretary of State for the Home Department to refuse permission to remain (and certification as clearly unfounded) for a grandmother on the basis of her article 8 private and family life as primary carer for her grandson while her daughter continued in full time employment and her son-in-law served in the armed forces. The circumstances were very similar to the circumstances in the present case. The grandmother acted as primary carer for the child whilst his parents were working. She enjoyed a close relationship with her daughter, son-in-law and grandson with whom she lived with in a close family unit. She provided assistance in her grandson's upbringing by taking care of him while her daughter was at work and had cared for her grandson since birth. No issue of separation of the child and his parents would arise upon removal of the grandmother. In upholding the review, Lady Wise held that the grandmother was more than just a close relative of the child and was one of his primary carers and the respondent's argument that she did not have parental responsibility for him was at best inaccurate and misleading and failed to address the particular role played by her in the life of the child. The child's interests were specifically recorded as relevant to the immigration decision and placing reliance on such a statement was an error in concluding that the petitioner's removal was not disproportionate on article 8 grounds (paragraph 20). Had her role as primary carer to the child since birth been properly factored in, it might have led to a different conclusion. As a result, the certification was reduced.

[16] I was particularly struck by the similarity of the facts in the present case to the facts in *MSA*, *supra*. Although the issue for the court (certification) was different from the issue in this petition, the court in reaching its decision looked at the issue of parental responsibility on a similar set of facts to the facts in the present case and rejected the respondent's argument that she did not have parental responsibility for the child as inaccurate and misleading. The court did this in respect of an article 8 claim outside the rules which was the issue for the First-tier Tribunal. Further, I could also see the logic in counsel for the petitioner's argument citing *SR (subsisting parental relationship), supra*, that the petitioner played a much stronger role in the children's lives than *SR* played in his daughter's life and given the decision of the Upper Tribunal in that case there must be a good argument and reasonable prospects for a similar result in the present case. It seems to me that it can be argued with a good prospect of success that the petitioner has stepped into the shoes of the children's parents in looking after the children. The best interests of the children would also be a primary consideration when deciding the issue (per Lord Hodge in *Zoumbas* v *Secretary of State for the Home Department* [2013] UKSC 74 at page 79). There are of course contrary arguments which can be deployed and facts which could be cited in support of the contrary arguments. It is not my role to decide the issue. My role is to determine whether the Upper Tribunal erred in law in refusing leave to appeal on this ground. Given the cases I have referred to above, and for the reasons I have set out, I am of the view that to conclude that the asserted existence of a *de facto* parental relationship was little short of fanciful is an error in law. With regard to the issue of materiality, this is clearly a material error in law as there is a real possibility that the determination of the Upper Tribunal might be different if an appeal on this ground is heard (*Tesco Stores Ltd* v *Dundee City Council* 2012 SC UKSC 278 per Lord Reed at paragraph 31). The ground of appeal is not without merit and may succeed.

That will be a matter for the Upper Tribunal. As was observed by Lord Eassie at paragraphs 11 and 12, (citing *Ganesabalan* v *Secretary of State for the Home Department* [2014] EWHC 2712 (Admin) at paragraphs 39 and 46 per Deputy High Court Judge Michael Fordham QC), when delivering the opinion of the court in *Khan* v *Secretary of State for the Home Department* 2015 SC 583, until the Upper Tribunal and the First-tier Tribunal approaches decisions lawfully, asking the legally relevant questions, having regard to legally relevant considerations and giving legally adequate reasons, it cannot be said that it would be inevitable that the same result would follow.

[17] With regard to the issue of whether the reasons for the decision of the Upper Tribunal were adequate, this issue is now somewhat academic given my decision on the principal ground of review. I would have in any event held that the reasons given were adequate. An informed reader would be aware of the material before the Tribunals, the decisions of the Tribunals and the basis for them when read in context. The informed reader would not be left in any real and substantial doubt about the reasons for the Upper Tribunal's decision.

[18] As it was accepted by counsel that grounds of review iii and iv were relevant to and supportive of the principal ground of review ii, I will not determine or opine on these grounds and I leave them to the Upper Tribunal to determine, if they are pursued, along with the parental relationship issue.

Disposal

[19] For the reasons given, I will sustain the petitioner's second plea-in-law and reduce the decision of the Upper Tribunal to refuse leave to appeal against the decision of the First-tier Tribunal, reserving meantime all questions of expenses.